90-1690

Supreme Court, U.S.
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NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

OLIVER BOND AND HERTA BOND

Petitioners

VS:

OCTAGON PROCESS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

(1) Did The Court of Appeals err in holding that the stream of commerce theory of *in personam* jurisdiction as applied to a manufacturer of a product, first definitively stated in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 490 (1980), had been rejected in *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed.2d 490 (1980), and *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987)? Three other Courts of Appeal have previously held to the contrary.

(2) Did the Court of Appeals err in upholding the dismissal of petitioners' complaint under Rule 12(b)(2), FRCP, rather than directing transfer to the proper district court in New

Jersey pursuant to 28 USC 1406(a) and this Court's decision in Goldlawr v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L.Ed.2d 39 (1962)?

PARTIES TO THE PROCEEDING

All parties to the proceedings in the District Court and Court of Appeals below appear in the caption. Petitioners are not aware that any parent or subsidiary companies of Respondent exist.

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REPORTS OF OPINIONS BELOW

The opinion of the District Court is reported as Bond v. Octagon Process, Inc., 745 F. Supp. 710 (D.C. Ga. 1990). The per curiam affirmance of the Court of Appeals is not reported yet.

JURISDICTION

The decision and judgment of the Court of Appeals sought to be reviewed were entered March 28, 1991. Motion for rehearing was not filed from the per curiam affirmance. This Court has jurisdiction of the petition under 28 USC 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

". . .[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . ."

(2) 28 USC 1406:

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. * * *"

STATEMENT OF THE CASE

Sgt. Oliver Bond was on active duty at the Elberton, Georgia, National Guard Armory on December 5, 1982, using a cleaning solvent supplied by the Department of Defense and manufactured by

respondent Octagon Process, Inc. of Edgewater, New Jersey. It was 21°F most of the day, and the combination of the cold temperature and the defatting and evaporative cooling of the solvent caused his hands to contract a disabling condition known as Raynaud's phenomenon, which has resulted in the fingers, particularly on the left hand, to "rot off". He has now been recognized as being totally disabled by the Veterans Administration. Due to initial confusion as to the nature of his condition,[1] this

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1. A civilian physician initially diagnosed the condition as Buerger's disease, attributed to smoking. This resulted in Sgt. Bond's being denied any medical or other benefits for almost 4 years. In late 1985, doctors at Eisenhower Army hospital reviewed his case and concluded that the condition was in fact, service-related, diagnosed as acquired acrosteolysis, secondary to exposure to chemical solvents and cold environment. This was later changed to Raynaud's phenomenon.

diversity of citizenship civil action was not filed until May 7, 1987. Defendant Octagon filed Motion to Dismiss, based on a challenge to jurisdiction over the person of Octagon by the federal district court in Georgia, and the governmental contractor immunity doctrine later addressed in this Court's decision in Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

With respect to the challenge to jurisdiction over the person of defendant, the evidence showed that defendant manufactured all of its products in New Jersey primarily for sale to the United States, and as to the solvent in question, all of its production was for the Defense Logistics Agency of the Department of Defense. The solvent was shipped to Department of Defense depots in Norfolk, Virginia;

Oakland, California; Mechanicsburg, Pennsylvania; Columbus, Ohio; Memphis, Tennessee; Richmond, Virginia; and Ogden, Utah. No shipments were made by respondent to Georgia, but as testified by a contracting officer for the Department of Defense, "While the supplying contractors do not know the ultimate destination of any solvent once it gets to a depot, from my experience all contractors know that the material is subject to being shipped to Army, Navy and Air Force bases all over the United States and its possessions. . .", and to National Guard Armories. (Ronald L. Perkinson affidavit). Respondent's president also indicated knowledge that the solvent was distributed by the depots to other areas. Respondent was the only manufacturer of the solvent for the Government during 1982, and one of only two during 1981.

The district court sustained respondent's motion to dismiss for lack of *in personam* jurisdiction (Appendix 1), but did not pass upon the governmental contractor immunity defense.[2]

The Court of Appeals affirmed *per curiam* "on the basis of the district court's dispositive opinion . . ." (Appendix 2)

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of *in personam* jurisdiction contrary to the way in which the Courts of Appeal for the First, Fifth and Seventh Circuits have decided it.

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2. Petitioner relied upon the exception recognized by this Court in *Boyle*, i.e., where the "supplier (failed to warn) the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States" (487 U.S. at 512).

Under Rule 10 of the Rules of this Court, that is a reason supporting the grant of certiorari.

This Court's decision in Asahi Metal Industry Co. Ltd. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and to a lesser extent, World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), have created confusion as to the status of the "stream of commerce" doctrine of in personam jurisdiction in products liability cases as applied to manufacturers, first definitively articulated in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).[3] "Since Gray v. American

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3. "As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those

Radiator & Standard Sanitary Corp., American courts have readily asserted jurisdiction over nonresident manufacturers and distributors whose injury-causing products have reached the

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products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired." (176 N.E. 2d at 766).

forum as a result of their purposeful introduction into the 'stream of commerce'. This stream of commerce concept supports the forum's exercise of jurisdiction - although the product's presence there is the immediate result of the independent actions and objectives of intermediaries in the distribution chain." Murphy, Personal Jurisdiction And The Stream Of Commerce Theory: A Reappraisal And A Revised Approach." 77 Ky. L.J. 248 (1988-89).

The Court expressly approved the doctrine in World-Wide Volkswagon, supra.[4] Nevertheless, the Court's

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4. "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare Gray v American Radiator & Standard Sanitary Corp., 22 Ill 2d 432, 176 NE2d 761 (1961)." (444 U.S. at 297-298). The dissenting opinions of Justices Brennan,

holding in that case (to the effect that jurisdiction could not be asserted in an Oklahoma Court against a New York Audi dealer who had sold a vehicle to a New York resident who drove the car into Oklahoma and had a wreck, nor against the New York-based regional distributor) did raise uncertainty about the scope of long-arm jurisdiction, and Asahi, supra, decided in 1987, raised doubts at least in

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f.n. 4 continued . . . Blackmun and Marshall obviously agreed with this proposition. Nevertheless, although World-Wide involved the different factual situation of a local car dealer and a regional distributor and not a manufacturer, some language of the Court concerning the "fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma" (444 U.S. at 295), and the discussion of forseeability and a defendant's "purposefully availing itself of the privilege of conducting activities within the forum state . . ." (444 U.S. at 295-297), generated some doubt as to jurisdiction.

the minds of commentators as to the continued viability of the stream of commerce theory.[5]

World-Wide Volkswagon, as the Court of Appeals for the Seventh Circuit recognized in Nelson v. Park Industries, Inc., 717 F2d 1120, 1125-26 (7th Cir. 1983), cert. den. 465 U.S. 1024 (1984), turned upon the fact that the suit there was against a retail dealer and regional

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5. Murphy, supra; Maltz, "Unraveling The Conundrum of the Law of Personal Jurisdiction: A Comment On Asahi Metal Industry Co. v. Superior Court of California", 1987 Duke L.J. 669, 671 (1987); Van der Creek, "Jurisdiction Over The Person - The Progeny of Pennoyer And The Future of Asahi", 13 Nova L.R. 1287, 1309 (1989); Note, "Personal Jurisdiction: The Evolution of the Minimum Contacts Analysis", 20 U. West. L.A. L.R. 219, 248 (1988-89); Note, "Personal Jurisdiction After Asahi: The Other International Shoe Drops", 55 Tenn. L.R. 41, 92 (1987); Note, "Jurisdiction, Fair Play and Foreign Defendants: Asahi Metal Industry Co. v. Superior Court", 61 St. John L.R. 629, 630 (1987) (Observing that the stream of commerce theory had been recognized by a majority of the Circuits).

distributor, and not the manufacturer or a national distributor. See Bean Dredging Corp. v. Dredge Technology Corp., 744 F2d 1081 (5th Cir. 1984).

Respondent argued below, and the District Court so held (which was adopted by the Court of Appeals) Opinion, p. 9 (Appendix 1) that the Court in Asahi expressly disapproved of the stream of commerce basis of jurisdiction as applied to a manufacturer. That clearly is not correct. Asahi was decided instead on the second of the two prongs of the International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed 95 (1945) jurisdictional test relating not to the sufficiency of minimum contacts, but to the proposition that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (326 U.S. at 316).

Justice O'Connor's opinion for herself and three other members of the Court did arguably reject stream of commerce in its pristine form, although seeming to recognize a modified version of the principle.[6] The factual situation in

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6. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." (480 U.S. at 112). The present case, it is submitted, satisfies this modified standard, for here defendant availed itself of the nation-wide and world-wide distribution system of the Department of Defense, by manufacturing the solvent solely for Defense Logistics Agency, and shipping it to 7 depots

Asahi dictated the result in that case, in that there, the damage suit by the forum based motorcycle driver injured from a tire blow-out had been settled, and the only dispute remaining was a question of contribution between two defendants, a Taiwanese manufacturer of the tube and the Japanese manufacturer of the valve assembly used in the tube, neither of which had any connection with the forum, California. An additional factor in Asahi was the presence of international commerce and the implication for foreign relations. 480 U.S. at 114-116; Maltz, supra, 1987 Duke L.J. at 679; The Supreme Court, 1986 Term, 101 Harv. L.R. 260, 265

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f.n. 6 continued. . . located in 6 widely separated states, knowing that it would in turn be shipped all over the nation and the world.

(1987); Murphy, supra, 77 Ky. L.R. at 274 (1988-89); A.I.M. International, Inc. v. Battenfeld Extrusion Systems, Inc., 116 F.R.D. 633, 641 (D.C. Ga. 1987).

In Morris v. SSE, Inc., 843 F2d 489 (11th Cir. 1988), the Eleventh Circuit observed that the status of the "stream of commerce" doctrine was uncertain after Asahi, but proceeded to hold in that case that jurisdiction was satisfied under either theory espoused in Asahi. Now, however, the Court of Appeals has, by adopting the district court decision, flatly held that stream of commerce as applied to a manufacturer has been discredited by Asahi. It is submitted that such is not the case. Justice Brennan with three other justices in Asahi expressly asserted the continued vitality of the principle, and Justice Stevens' special concurrence seems to

lean toward the Brennan opinion on this point by (1) rejecting the linch-pin of Justice O'Connor's rationalization, i.e., the "purposefully availing" requirement and (2) in his insistence that there is not necessarily any distinction between "purposefully availing" and "mere awareness" (480 U.S. at 122).[7]

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7. The "purposeful availment" twist to in personam jurisdiction under minimum contacts was added by Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958), but Justice Brennan's opinion for the Court in Burger King Corp. v Rudewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), makes clear that the elements of "stream of commerce" also satisfy the purposeful availment gloss. See 471 U.S. at 472-473, where after referring to a defendant purposefully directing his activities toward the forum, Justice Brennan declares: "Thus '[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. World-Wide Volkswagon Corp. v. Woodson,

It is respectfully submitted that the Courts below erred in refusing to follow the stream of commerce doctrine under the facts here, which as stated previously, satisfied even the modified O'Connor version. On the other hand, three other Circuits, the First, Fifth and Seventh Circuits, have held that "stream of commerce" survives Asahi. As to the Fifth Circuit, see Irving v. Owens-Corning Fiberglas Corp., 864 F2d 383 (5th Cir. 1989); Gulf Consolidated Services v. Corinth Pipeworkers, S.A., 898 F2d 1071 (5th Cir. 1990). The Seventh and First Circuits also have either upheld or applied the stream of commerce theory of jurisdiction after Asahi. Mason v. F. Lli Luigi & Franco

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f,n. 7 continued . . . supra. . ." See also, Justice White's opinion in World-wide, which says that stream of commerce satisfies the purposefully availing requirement. (444 U.S. at 297).

Dal Maschio, 832 F2d 383 (7th Cir. 1987) (citing Gray, and Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F2d 26 (1st Cir. 1988) (Approves theory, but direct marketing by defendant also was involved). The stream of commerce doctrine was well-settled prior to Asahi. Gray v. American Radiator and Standard Co., supra; In re Agent Orange Litigation, 818 F2d 145 (2nd Cir. 1987); Omstead v. Brader Heaters, Inc., 5 Wash. App. 258, 487 P2d 234, 240 (1971), aff'd 80 Wash 2d 720, 497 P2d 1310, 1972); Oswalt v. Scripto, 616 F2d 191 (5th Cir. 1980) (Japanese manufacture of cigarette lighters subject to suit in U.S.); Sells v. International Harvester Co., 513 F2d 762 (5th Cir. 1975); reh. den. 522 F2d 1280; Bean Dredging Corp. v. Dredge Technology Corp.; 744 F2d 1081 (5th Cir. 1984); DeJames v. Magnificience Carriers, Inc., 654 F2d 280 (3rd Cir. 1981), cert.

den. 454 U.S. 1085 (1981); Pfiffer v. International Academy, 521 F. Supp. 1331 (D.C. Mo. 1981); Tedford v. Grumman American Aviation Corp., 488 F. Supp. 144 (D.C. Miss. 1980); Stoehr v. American Honda Motor Co., 429 F. Supp. 763 (D.C. Neb. 1977); Haley v. Wright Mfg. Co., 651 F. Supp. 116 (D.C. La. 1986); McDaniel v. Armstrong World Industries, 603 F. Supp. 1337 (D.C. D.C. 1985); McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 714 (D.C. Ill. 1978) (Canadian seller of asbestos held subject to suit by placing asbestos in stream of commerce); Hall v. Zambelli, 669 F. Supp. 753 (D.C. W. Va. 1987) (where manufacturer sells to a distributor knowing that the product is to be distributed throughout the United States, due process is satisfied); Scott v. Crescent Tool Co., 296 F. Supp. 147 (D.C. Ga. 1968); Payne v. Kristofferson,

631 F. Supp. 39 (D.C. Ga. 1985); Rowe v. Dorrough, 150 Cal. App. 3rd 901, 198 Cal. Rptr. 131 (1984); Irving v. Owens-Corning Fiberglas Co., 864 F2d 383 (5th Cir. 1989); Value Engineering Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29 (1976); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305 (D.C. Ga. 1980); Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476 (D.C. Ga. 1975); Burton v. Subaru of America, Inc., 646 F. Supp. 78 (D.C. Ga. 1986); 63 Am. Jur. 2d 1286, §893; 4 Wright & Miller, Federal Practice and Procedure, §1069, at pp. 391-392.

The Court below erred in holding that the doctrine has been abrogated by Ashai.

The District Court below also erred in undertaking to construe the Georgia long-arm jurisdiction statute because, having recognized that it had been

construed by the Georgia Courts as extending jurisdiction over nonresidents to the maximum extent allowed by due process, it is not necessary to consider or apply state law. Morris v. SSE, Inc., 843 F2d 489, n. 3 (11th Cir. 1988); Interfirst Bank Clifton v. Fernandez, 844 F2d 279, 282 (5th Cir. 1988); Irving v. Owens-Corning Fiberglas Corp., 864 F2d 383, 385 (5th Cir. 1989); Bean Dredging Corp. v. Dredge Technology Corp., 744 F2d 1081, 1083 (5th Cir. 1984); American Greetings Corp. v. Cohn, 839 F2d 1164, 1167 (6th Cir. 1988); Sinatra v. National Enquirer, Inc., 854 F2d 1191 (9th Cir. 1988).

THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE COURT BELOW SHOULD HAVE TRANSFERRED UNDER 28 USC 1406(a) RATHER THAN DISMISSING

In Goldlawr v. Heiman, 369 U.S. 463, 82 S. Ct. 913, 8 L.Ed.2d 39 (1962), this Court held that transfer to an appropriate venue rather than dismissal was proper

under 28 USC 1406(a), in a case where both venue and jurisdiction were lacking, even where there was no motion to transfer. In this case, venue was proper as far as the statute was concerned, but the District Court and Court of Appeals held that jurisdiction was lacking. Here, as in Goldlawr, plaintiffs did not move for a transfer in the District Court, and reasonably could not do so without waiving their contention that jurisdiction existed under the stream of commerce theory, but they did enumerate error in the Court of Appeals on the ground that the District Court should have done so sua sponte independently of a motion. The Court of Appeals rejected this enumeration of error. In Goldlawr, the Court held that transfer rather than dismissal was proper because "The problem which gave rise to the enactment of the section was that of avoiding the

injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be 'found' or that they 'transact . . . business' in the Eastern Disrict of Pennsylvania. The language and history of §1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid

precisely this sort of injustice." (369 U.S. at 466).

The same principle is applicable here. Because a civilian physician originally diagnosed petitioner Oliver Bond's condition as being unrelated to the chemical exposure, it was not until amost four years later that he learned otherwise. This presented no problem under the Georgia Statute of Limitations in products liability cases which is to the effect that the statute starts to run when the plaintiff discovers the facts of the case indicating that he has a cause of action. Andel v. Getz Services, 197 Ga. App. 653, 399 SE2d 226 (1990). Georgia also has a rule that where a plaintiff suffers dismissal that is not on the merits, he may refile within six months thereafter regardless of whether the statute of limitations has run in the interim.

O.C.G.A. §9-2-61. Georgia law also is to the effect that when an action is brought in the wrong venue, whether because of jurisdiction or otherwise, the Court should not dismiss, but should transfer to the proper court. Constitution of Georgia, 1983, Art. VI, Sec. I, Par. VIII. All of these questions are uncertain under New Jersey law, and it is doubtful that petitioners could refile in New Jersey.

The Court of Appeals' per curiam affirmance left these questions unconsidered, but respondent's argument below was that §1406(a) applies only where venue is improper, but not where in personam jurisdiction was lacking. This distinction is not a valid one, as observed in Wright & Miller (Vol. 15, §382), p. 171), and as more particularly recognized in the decision of the Fifth

Circuit in Dubin v. U.S., 380 F2d 813 (5th Cir. 1967), and in other cases, such as Porter v. Groat, 840 F2d 255, 258 (4th Cir. 1988); Ross v. Colorado Outward Bound School, Inc., 603 F. Supp. 306 (D.C. N.Y. 1985); Tillary v. Idaho Power Co., 425 F. Supp. 376 (D.C. Wash. 1976); Westphal v. Mace, 660 F. Supp. 10 (D.C. Ariz. 1987); Ladwig v. Trust Ins. Exchange, 498 F. Supp. 161 (D.C. Wis. 1980); Mayo Clinic v. Kaiser, 383 F2d 653, 655 (8th Cir. 1967); Hapaniewski v. City of Chicago Heights, 883 F2d 576 (7th Cir. 1989); Corke v. Sameit M.S. Song of Norway, 572 F2d 77 (2nd Cir. 1978); and Bentz v. Recile, 778 F2d 1026 (5th Cir. 1985).

As Judge Johnson pointed out for the Court in Dubin, the statute itself does not refer to venue, but instead, uses the terms "district" or "division".

In Goldlawr v. Heiman, supra both venue and jurisdiction were lacking, and clearly, if transfer is proper when both are lacking, transfer is equally proper when only one is lacking.

A Court of Appeals is authorized and empowered to transfer cases under §1406(a). Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 343 F2d 905 (8th Cir. 1965); Becker v. Commission of Internal Revenue, 852 F2d 524 (11th Cir. 1988). Here, the Court of Appeals did not order transfer, so it presumably adopted respondent's argument that transfer was not proper because the Georgia District Court lacked jurisdiction and not just venue. This is contrary to the law in at least 5 other circuits. This Court should hold that (1) Transfer under §1406 is proper when jurisdiction or venue are lacking; (2) That the District Court itself should

transfer without requiring the plaintiff to waive his objections to the holding of no jurisdiction; and (3) The Court of Appeals on appeal should order transfer when the District Court fails to do so. Only in this way can the mass of confusion evidenced in some district court decisions be resolved.

CONCLUSION

The writ should be granted.

Respectfully Submitted,

HEARD, LEVERETT & PHELPS, P.C.

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APPENDIX

I

PER CURIAM OPINION OF THE COURT OF APPEALS

OLIVER M. BOND and HERTA R. BOND,
Plaintiffs-Appellants,

v.

OCTAGON PROCESS, INC.,
Defendant-Appellee.

No. 90-8898.

United States Court of Appeals,
Eleventh Circuit.

March 28, 1991.

Appeal from the United States District Court for the Middle District of Georgia, Duross Fitzpatrick, District Judge.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The judgment of the district court is affirmed on the basis of the district court's dispositive opinion, which is reported as Bond v. Octagon Process, Inc., 745 F. Supp. 710 (M.D. Ga. 1990).

AFFIRMED.

II

PER CURIAM OPINION OF
THE COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

OLIVER M. BOND and HERTA R. BOND,

Plaintiffs,

vs.

OCTAGON PROCESS, INC.,

Defendant.

CIV. NO. 87-41-ATH(DF)

Filed at 4:40 P.M., September 19, 1990
Donna N. Phillips, Deputy Clerk,
U.S. District Court
Middle District of Georgia

FITZPATRICK, District Judge

This products liability case is before the court for resolution of the defendant's motion to dismiss for lack of personal jurisdiction and, alternatively, for summary judgment based on the plaintiff's failure to state a claim.

I. FACTS

On December 5, 1982, plaintiff Oliver Bond was engaged in active service with the National Guard at the Elberton, Georgia, Armory and was washing an M578 recovery vehicle with a cleaning solvent, MIL-C-11090D, NSN 6850-00-224-6665, manufactured by the defendant. The day was a very cold one and the plaintiff applied the solvent using a brush and bucket without protective gloves and without having read the warning label on the solvent cans. After a short while, his hands started burning, but he continued to wash the vehicles for several hours. The pain in his hands continued through the next day.

After the pain lasted for some time, plaintiff went to see a civilian doctor who diagnosed his problem as Buerger's disease, which is related to smoking.

Another doctor, however, diagnosed the plaintiff's condition as Raynaud's phenomenon, the freezing of flesh in such a manner as to damage permanently blood vessels and cut off circulation. In 1986, doctors at Eisenhower Medical Center at Fort Gordon, Georgia, identified the plaintiff's problem as acquired acrosteolysis caused by exposure to chemical solvents and a cold environment. Later, this diagnosis was changed to Raynaud's phenomenon caused by cold environment and the defatting and evaporative effects of chemical solvents, rather than any toxic effects of the solvent in question itself. In other words, the plaintiff claims his injuries are due to the combination of cold weather and the effect of solvents in such weather of removing the oils on the skin and making it more vulnerable to the

cold. Additionally, he claims that the solvent further cools the skin through evaporative cooling, which occurs when body heat is lost in warming the solvent on the skin and converting it from a liquid to a gaseous state. In cold weather, these properties of the solvent mean that any flesh coming into contact with it will cool more quickly than otherwise and be susceptible to freezing. Since the incident, plaintiff has suffered great pain and is in the process of losing his fingers and possibly his hands as the skin tissue slowly dies.

Plaintiff filed his complaint on May 7, 1987, seeking damages for personal injuries, including pain and suffering, permanent and total disability, loss of wages, loss of ability to labor, loss of fingers and for hospital and medical expenses. His wife, Herta Bond, also

sued for loss of consortium, including services, society, companionship and affection. Plaintiffs allege that Mr. Bond's injuries were caused by the defendant's failure to provide adequate warnings of the dangers of exposure to solvents at low temperatures.

Octagon Process, the defendant, is a New Jersey corporation with no offices, employees, agents or other personal contacts with Georgia. Octagon has no agent for service of process in Georgia and has never sought approval from the state of Georgia to do business there.

At its plant in New Jersey, the defendant manufactures the solvent in question pursuant to a government contract. The solvent is made according to specifications issued by the government; Octagon did not develop or alter the formula supplied by the

government. A government inspector stationed at the defendant's plant supervised the manufacturing process and had the authority to set aside any shipment that failed to conform to the specifications before it left the premises. The solvent was made for sale to the United States only and has never been sold to any private purchaser. At the time of the injury, Octagon was the only approved supplier of the solvent.

On June 14, 1989, Octagon filed its motion for dismissal and summary judgment based on three theories: (1) that there is no personal jurisdiction based on the Georgia long-arm statute; (2) that even if the statute gives this court jurisdiction the defendant will be put to unreasonable hardship if it must defend in Georgia; and (3) that the government contractor defense applies and shields

the defendant from liability. After reviewing the applicable law and facts, the court is ready to issue its ruling.

II. PERSONAL JURISDICTION

In a federal diversity suit, there is a two-step process used in determining whether a state jurisdictional statute confers jurisdiction over a non-resident defendant. First, it must be decided whether the defendant is amenable to suit under the state statute, as determined by the law of the state. Next, if the first step is met, the court must decide whether the assertion of jurisdiction over the defendant meets federal due process requirements. Delong Equipment Co. v. Washington Mills Abrasive Co., 840 F.2d 843 (11th Cir. 1988); Oswalt v. Scripto, Inc., 616 F.2d 191, 195-96 (5th Cir. 1980).

The plaintiff seeks to bring the defendant within the reach of the Georgia long-arm statute, O.C.G.A. § 9-10-91, which reads in pertinent part:

> A court of this state may exercise personal jurisdiction over any non-resident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he: . . .
>
> > (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; . . .

Plaintiffs must show that the defendant is amenable to suit under this statute before any federal constitutional questions are reached. It has been determined by Georgia courts that the Georgia long-arm statute allows for

jurisdiction to be exercised over defendants to the maximum extent allowed by due process. Value Engineering Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29 (1976); Hollingswroth v. Cunard Line, 152 Ga. App. 509, 263 S.E. 2d 190 (1979). In order to comply with this section of the long-arm statute, the following test must be satisfied:

> (1) The nonresident has purposefully done some act or consummated some transaction with or in the forum (but the actual act or omission resulting in the injury here need not have occurred in this state.) The defendant need not be physically within the forum when this act or transaction occurs and a single such instance may suffice;
>
> (2) The Georgia plaintiff must have a legal cause of action in tort against the nonresident, which arises out of, or results from, the purposeful activity of the defendant involving this state; a resident is the victim of a "tortious act" when he suffers an injury here due to an act or omission of negligence occurring outside this state; and

(3) If the requirements of (1) and (2) are satisfied, the exercise of jurisdiction over the nonresident must be "reasonable."

Shellenberger v. Tanner, 138 Ga. App. 399, 404-05, 227 S.E.2d 266, 273 (1976); cited with approval in Smith v. Smith, 254 Ga. 450, 330 S.E.2d 706, 706 (1985); Delong, 840 F.2d at 849.

The court is not satisfied that the first part of the Shellenberger test has been met in this cse. It is undisputed that Octagon has no direct ties with Georgia, as noted above. The deposition of Mr. Lee Leibmann, Octagon's president, indicates that the defendant shipped the solvent in question to various government depots around the country, after which the government sent it to where it was needed. (Depo. pp. 22-24). Thus, the defendant shipped the product to an independent distributor who then controlled where it ws ultimately sent.

This is the closest contact Octagon has ever had with Georgia, and it simply does not qualify as "a transaction with or in the forum." Shellenberger, 227 S.E.2d at 273. If, for example, Octagon had directly sent the solvent to the National Guard armory in Elberton or consummated a bargain to sell the solvent directly to the Georgia National Guard this would of course satisfy the test, but such is not the case here, and the defendant is thus not amenable to suit under the Georgia long-arm statute.

Even if all three of the Shellenberger requirements had been fulfilled, Octagon would still not be subject to the jurisdiction of this court because federal constitutional due process requirements are not satisfied. The Supreme Court has laid down and developed guiding principles of due process in a

series of cases over the past several decades.[1] In International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), the Court stated the basic two-part test for determining when states may exercise jurisdiction over non-resident defendants: (1) they must have "minimum contacts" with the forum state and (2) the maintenance of the suit must not offend "traditional notions of fair play and substantial justice." 326

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1. There are two types of personal jurisdiction: general and specific. General personal jurisdiction arises from a party's contacts with the forum state that are unrelated to the litigation; the test is whether the party had "continuous and systematic" general business contacts with the forum state. Specific personal jurisdiction is based on a party's contacts with the forum state that are related to the litigation. Delong, 840 P.2d at 853 (citations omitted). The plaintiff in the case at bar has not alleged that general jurisdiction exists over the defendant and could not do so given the facts. the discussion in the text therefore concerns specific jurisdiction.

U.S. at 316, 66 S.Ct. at 158. (The second part of this test has been rephrased to mean that it must be "reasonable" for a court to exercise jurisdiction over a defendant. Delong, 840 F.2d 854.) This standard was later clarified to mean that due process requires some purposeful availment by the defendant of the privilege of conducting activities in the forum state and thus invoking the benefits and protections of that state's laws. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958).

A limit on expanding notions of due process was provided in World-Wide Volkswagon v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), in which the Court rejected the notion that the defendant was amenable to suit simply because of the "foreseeability" that the

item it sold might enter the forum state. Instead, the Court decided that due process was based on whether the defendant's conduct and connection with the forum state were such that it could reasonably anticipate being haled into court there. 444 U.S. at 297, 100 S.Ct. at 567. In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), the Court stated that jurisdiction over a non-resident defendant was proper if the defendant had delivered its products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state and those products subsequently injured forum consumers. 471 U.S. at 473, 105 S.Ct. at 2182.

The Supreme Court greatly narrowed the application of the stream of commerce theory in Asahi Metal Ind. v. Superior

Court of California, Solano County, ____ U.S.____, 107 S.Ct. 1026, 1033 (1987). Asahi was a Japanese valve assembly manufacturer who sold its products to a Taiwanese tire manufacturer who exported the completed tires to the United States. After a products liability suit was filed because of an accident allegedly caused by a defective tire, the Taiwanese defendant filed a cross-claim for indemnification which became the subject of the case that reached the Supreme Court after the underlying action had been settled and dismissed. The California Supreme Court had earlier determined that due process would allow for the exercise of jurisdiction over Asahi in California, since the defendant had intentionally placed its products in the stream of commerce and knew that some

of the completed tires containing its products would be sold in California.

In analyzing whether Asahi had form (sic) sufficient minimum contacts with California to justify that state's exercise of jurisdiction, a plurality of the Court noted that since its decision in World-Wide Volkswagon, 444 U.S. 286, 100 S.Ct. 559, two versions of the stream of commerce theory had arisen. Some courts had read the due process clause as allowing for jurisdiction based on nothing more than the defendant's placing the product in the stream of commerce, while others had required some action of the defendant more purposefully directed at the forum state than mere awareness that its product would eventually reach there. The California Supreme Court had adhered to the former view of due process. Asahi, 107 S.Ct. at 1032.

The Supreme Court, however, decided that this was not sufficient and that for the due process clause to be satisfied there had to be some act of the defendant purposefully directed toward the forum state. Merely placing an item in the stream of commerce, without more, was held not to be enough. Furthermore, the Court stated that even the defendant's awareness that its product would eventually reach the forum state via the stream of commerce did not convert the act of placing the product into the stream into an act purposefully directed toward the forum state. 107 S.Ct. 1033.

Keeping these standards in mind, it is clear to this court that it cannot exercise personal jurisdiction over Octagon. Even assuming that the plaintiffs are correct when they claim that Octagon knew its product would

eventually enter Georgia (Brief on Behalf of Plaintiffs in Opposition to Defendant's Motions to Dismiss, for Failure to State a Claim, and for Summary Judgement, pp. 8-9), Asahi has made it clear that this is simply not enough to form sufficient minimum contacts so that Octagon could foresee being haled into court here. The record reveals no other act by the defendant purposefully directed toward Georgia as required by Asahi. When Octagon sold the solvent to the Department of Defense, which acted as an independent distributor, it merely placed its product into the stream of commerce, an act which alone will not allow this court to exercise personal jurisdiction in Georgia.[2]

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2. The court is aware that this reading of Asahi will allow defendants to organize their operations to avoid selected jurisdictions and their laws. Cound, Friedenthal, Miller & Sexton,

Plaintiffs make a valiant, but unsuccessful, effort to distinguish Asahi. They correctly point out that Asahi dealt with a cross-claim for indemnification after the original suit involving the injured party had been settled. While valid, this distinction is insufficient to overcome the general jurisdictional rules laid down in the case. To adopt plaintiff's interpretation would limit Asahi to cases with facts practically identical to it, something which this court declines to do. Also, plaintiffs claim that one of the main reasons the Supreme Court found that there was no jurisdiction over Asahi in California was because the case involved two foreign parties and to have

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f.n. 2 continued . . . Civil Procedure 137 (5th ed. 1989). Nonetheless, the Supreme Court's ruling compels this result.

exercised jurisdiction over the defendant would have subjected it to the unique burdens of defending in a foreign legal system. This is also true, but this reason concerns the second part of the International Shoe test (whether exercising jurisdiction over the defendant is reasonable), and has nothing to do with the first part (whether the defendant has sufficient minimum contacts with the forum). While it may be reasonable to exercise jurisdiction over Octagon in this case, the court still cannot do so if the defendant lacks sufficient minimum contacts with the forum, which, as discussed above, is true of Octagon.

In addition, the plaintiffs attempt to distinguish World-Wide Volkswagen, which itself placed some limits on due process jurisdiction, by noting that the

defendant in that case, over whom the Supreme Court decided that jurisdiction could not be exercised, was merely a distributor of the product and not a manufacturer. Plaintiffs give great weight to the fact that Justice Blackmun himself pointed out this distinction, 444 U.S. at 317-318, 100 S.Ct. at 570 (Blackmun, J., dissenting), and claim that since this suit is against a manufacturer the court should exercise its jurisdiction. The court notes, however, that the defendant in Asahi, over whom the Supreme Court held there was no jurisdiction in part because of insufficient minimum contacts, was also a manufacturer, and thus the plaintiffs' distinction has little influence. As Asahi makes clear, the essential question is whether the defendant, regardless of his status as a manufacturer or

distributor, has done some act purposefully directed toward the forum state so as to form sufficient minimum contacts with that state such that he could anticipate being haled into court there. Regarding Octagon, this requirement simply has not been fulfilled.

Plaintiffs also place great reliance on Oswalt, 616 F.2d 191, and some similar cases.[3] In Oswalt, the plaintiff was injured when a cigarette lighter malfunctioned. The lighter had been manufactured in Japan but distributed in the United States by Scripto, Inc., an

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3. The plaintiffs also cite Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984), and Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367 (5th Cir. 1986). In both cases the Fifth Circuit held that the defendants were subject to personal jurisdiction because they had placed their products in the stream of commerce with the expectation or knowledge that the goods would reach the forum state.

American Corporation. There was no evidence that the Japanese manufacturer had any officers or agents in the United States or any contacts with the United States at all except for the distributing agreement with Scripto. Nonetheless, the court found that there was personal jurisdiction over the manufacturer because it knew that its lighters were being sold nationally in the United States and thus had reason to know that its products would reach the scene of the injury. By utilizing the distribution network established by Scripto, the Japanese company had established sufficient minimum contacts so that it could reasonably expect to be haled into court in this country. 616 F.2d at 198-200.

Plaintiffs' reliance on Oswalt and cases with similar holdings is misplaced,

however, because of changes in the law. Oswalt was decided in 1980 immediately after the Supreme Court's decision in World-Wide Volkswagen and adhered to the view that merely placing a product in the stream of commerce without more was enough to satisfy due process requirements. As noted above, the Supreme Court rejected this line of thinking in Asahi by holding that due process also requires some purposeful act by the defendant directed toward the forum state. Oswalt and cases like it simply do not speak to the case at bar.

III. CONCLUSION

After careful consideration of the facts and law in this case, the court has decided that Octagon's motion to dismiss for lack of personal jurisdiction due to insufficient minimum contacts between it

and the forum state should be GRANTED. Accordingly, the court need not reach the questions of whether it would be reasonable to exercise jurisdiction over the defendant in Georgia or the government contractor defense. The plaintiffs' case is hereby ordered DISMISSED.

SO ORDERED, this 19 day of September, 1990.

/s/ DUROSS FITZPATRICK
DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

PUBLISHER'S NOTE

THE FOLLOWING PAGES ARE UNAVAILABLE FOR FILMING:

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CERTIFICATE OF SERVICE

I hereby certify that I have served copy of the foregoing Petition for Writ of Certiorari upon Mr. Carl R. Woodward, Carella, Byrne, Bain, Gilfillan, Cecchi and Stewart, 6 Becker Farm Road, Roseland, New Jersey 07068-1739 and upon Mr. Peter J. Anderson, Peterson, Young, Self & Asselin, Suite 1100, 230 Peachtree Street, N.W., Atlanta, Georgia 30303, Attorneys for Respondent, by mail, duly addressed and postage prepaid.

This 30th day of April, 1991.

E. Freeman Leverett

Attorney for Petitioners

FILED
MAY 31 1991
OFFICE OF THE CLERK

No. 90-1690

In The

Supreme Court of the United States

October Term, 1990

OLIVER M. BOND and HERTA R. BOND,

Petitioners,

vs.

OCTAGON PROCESS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

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RESTATED QUESTIONS PRESENTED FOR REVIEW

1. Whether the case was properly dismissed for lack of *in personam* jurisdiction because petitioners failed to establish the existence of sufficient contacts between respondent and the forum State of Georgia.

2. Whether, in the absence of *in personam* jurisdiction over the respondent, the case was properly dismissed rather than transferred pursuant to 28 U.S.C. § 1406(a) where petitioner never requested or raised the transfer issue to the District Court?

LIST OF COMPANIES PURSUANT TO RULE 28.1

Respondent Octagon Process, Inc. ("Octagon") has no parent company, subsidiaries or affiliates.

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No. 90-1690

In The

Supreme Court of the United States

October Term, 1990

OLIVER M. BOND and HERTA R. BOND,

Petitioners,

vs.

OCTAGON PROCESS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia in this case has been published in 745 F. Supp. 710 (M.D. Ga. 1990). On March 28, 1991, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court based upon the reported opinion of the District Court. The opinion

of the Eleventh Circuit has been published in 926 F.2d 1573 (1991).

COUNTERSTATEMENT OF THE CASE

On December 5, 1982, petitioner Oliver M. Bond was on active duty with the National Guard at the Elberton Armory, in Georgia. Petitioner claims to have been injured while he was using a solvent to clean National Guard vehicles at the Armory. The cleaning solvent used by petitioner was allegedly manufactured by respondent Octagon Process, Inc. ("Octagon"), pursuant to government contract and under government specifications and supervision.

On May 7, 1987, petitioner Oliver Bond filed his complaint in the United States District Court for the Middle District of Georgia seeking damages for personal injuries sustained to his hands as well as for hospital and medical expenses. His wife, Herta Bond, also sued for damages *per quod*. Petitioners alleged "that Mr. Bond's injuries were caused by the defendant's failure to provide adequate warnings of the dangers of exposure to solvents at low temperatures." *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 711 (M.D. Ga. 1990).[1]

Octagon is a New Jersey corporation which manufactured a certain cleaning solvent pursuant to a detailed military specification (MIL-C-11090D) and government contract therefor. No contacts or connections between Octagon and the forum State of Georgia were shown by petitioners nor was any evidence presented that Octagon ever conducted any business in the State of Georgia. As succinctly stated by the District Court:

---

1. It is undisputed that petitioner, Oliver M. Bond, never read the warning label contained on the solvent labels, which specifically warned against contact with skin (Dep. of Oliver M. Bond, 9/30/88, pp. 23-20 to 28-24).

> Octagon Process, the defendant, is a New Jersey corporation with no offices, employees, agents or other personal contacts with Georgia. Octagon has no agent for service of process in Georgia and has never sought approval from the state of Georgia to do business there.
>
> At its plant in New Jersey, the defendant manufactures the solvent in question pursuant to a government contract. The solvent is made according to specifications issued by the government; Octagon did not develop or alter the formula supplied by the government. A government inspector stationed at the defendant's plant supervised the manufacturing process and had the authority to set aside any shipment that failed to conform to the specifications before it left the premises. The solvent was made for sale to the United States only and has never been sold to any private purchaser. At the time of the injury, Octagon was the only approved supplier of the solvent.

Bond v. Octagon Process, Inc. 745 F. Supp. at 711.

On June 14, 1989, Octagon filed a motion to dismiss the case and/or for summary judgment based on three theories which included: (1) lack of personal jurisdiction; (2) that even if personal jurisdiction existed, Octagon would be put to an unreasonable hardship if it had to defend in Georgia; and (3) that the government contractor defense applied and shielded Octagon from liability.[2]

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2. The courts below never reached the second and third issues because of their decisions on the jurisdictional issue.

In a published decision issued on September 19, 1990, the District Court dismissed petitioners' case on two grounds. First, the District Court concluded that Octagon was not amenable to suit under the Georgia long-arm statute. Second, the District Court concluded that Octagon could not be subject to suit in Georgia consistent with federal constitutional due process requirements because petitioners had failed to establish sufficient minimum contacts between Octagon and the forum State of Georgia.

The District Court analyzed the Georgia long-arm statute and concluded that respondent was not subject to the Georgia long-arm statute. *Bond v. Octagon Process, Inc., supra,* 745 F. Supp. at 712. The District Court stated as follows:

> It is undisputed that Octagon has no direct ties with Georgia, as noted above. The deposition of Mr. Lee Leibmann, Octagon's president, indicates that the defendant shipped the solvent in question to various government depots around the country, after which the government sent it to where it was needed. (Depo. pp. 22-24.) Thus, the defendant shipped the product to an independent distributor who then controlled where it was ultimately sent. This is the closest contact Octagon has ever had with Georgia, and it simply does not qualify as "a transaction with or in the forum."

Id. The District Court concluded that this conduct did not constitute the purposeful doing of some act or consummation of some transaction with or in the forum state as required by the long-arm statute. *Id.*

The District Court next turned to federal constitutional due process requirements as an alternative basis for its decision and concluded that Octagon did not have the requisite "minimum

contacts" with the forum State of Georgia. *Id.* at 712. The court undertook a comprehensive review of Supreme Court decisions regarding "minimum contacts" and concluded that established Supreme Court precedent required that there be some act of the defendant purposely directed to the forum state. *Id.* at 713. The District Court concluded that it could not exercise personal jurisdiction over Octagon, and stated that:

> Even assuming that the plaintiffs are correct when they claim that Octagon knew its product would eventually enter Georgia . . ., *Asahi* has made it clear that this is simply not enough to form sufficient minimum contacts so that Octagon could foresee being haled into court here. The record reveals no other act by the defendant purposefully directed toward Georgia as required by *Asahi*. When Octagon sold the solvent to the Department of Defense, which acted as an independent distributor, it merely placed its product into the stream of commerce, an act which alone will not allow this court to exercise personal jurisdiction in Georgia.

Id. at 713-714.

Petitioners appealed the District Court's decision to the Eleventh Circuit Court of Appeals. The issue of *in personam* jurisdiction was briefed at length, as was the newly raised issue of whether the District Court should have *sua sponte* transferred the case to the District of New Jersey. The Court of Appeals heard oral argument on March 6, 1991 and on March 28, 1991, affirmed the decision of the District Court based upon the reported opinion below.

SUMMARY OF OCTAGON'S OPPOSITION TO BONDS' PETITION FOR CERTIORARI

Petitioners have not presented this Court with any substantial issue meriting review. The District Court's dismissal of the case due to lack of *in personam* jurisdiction over the respondent Octagon, was affirmed by the Eleventh Circuit on the basis of the District Court's dispositive, reported decision. The District Court's decision is in accord with Supreme Court jurisprudence and does not conflict with any decision by this Court. The decision below is not in conflict with the decision of any other Circuit Court of Appeals, and it does not in any other way call for the exercise of this Court's supervisory powers. In addition, the courts below did not err by dismissing this case rather than transferring the case to New Jersey where petitioners failed to request such relief from the District Court.

ARGUMENT

I.

THE COURTS BELOW PROPERLY DISMISSED THE CASE FOR LACK OF *IN PERSONAM* JURSDICTION BECAUSE PETITIONERS FAILED TO ESTABLISH SUFFICIENT CONTACTS BETWEEN RESPONDENT OCTAGON AND THE FORUM STATE OF GEORGIA.

The evolution of the due process standards that guide courts in determining whether a defendant is amenable to *in personam* jurisdiction in a particular forum has been set forth in the reported decision of the District Court, and need not be repeated at length herein. The primary consideration in the jurisdictional inquiry is that of fundamental fairness to the defendant. As the facts of this case make clear, the lower courts correctly dismissed this case because petitioners had failed to establish sufficient, if any,

contacts between Octagon and the forum State of Georgia.

A. The Georgia Long-arm Statute Provides an Independent and Adequate Basis for the Decision of the Lower Courts.

It is fundamental that the Court need not reach a constitutional issue where the case can be decided on some other grounds, such as statutory construction or general law. *United States v. Wells Fargo Bank,* 485 U.S. 351, 354, 108 S. Ct. 1179, 99 L. Ed. 2d 368 (1988). The lower courts applied a two-step analysis in determining whether the Georgia long-arm statute conferred jurisdiction over Octagon.[3]

The Georgia long-arm statute, O.C.G.A. § 9-10-91, provides in pertinent part:

> A court of this state may exercise personal jurisdiction over any non-resident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he: . . .
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed

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3. "First, it must be decided whether the defendant is amenable to suit under the state statute, as determined by the law of the state. Next, if the first step is met, the court must decide whether the assertion of jurisdiction over the defendant meets federal due process requirements." *Bond v. Octagon Process, Inc., supra,* 745 F. Supp. at 711, citing *DeLong Equipment Co. v. Washington Mills Abrasive Co.,* 840 F.2d 843 (11th Cir. 1988).

or services rendered in this state;

* * *

The lower courts applied a three-element test to determine if Octagon was subject to the reach of the Georgia long-arm statute.[4] This test was set forth in *Schellenberger v. Tanner,* 138 Ga. App. 399, 404-05, 227 S.E. 2d 266, 273 (1976) and was cited with approval by the Supreme Court of Georgia. *Smith v. Smith,* 254 Ga. 450, 330 S. Ed. 2d 706 (1985); *see DeLong,* 840 F.2d at 849.

The lower courts concluded that the first element of the *Schellenberger* test was not met. The District Court concluded as follows:

> The court is not satisfied that the first part of the *Schellenberger* test has been met in this case. It is undisputed that Octagon has no direct ties with

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4. The three elements of the test are as follows:

1. The non-resident has purposefully done some act or consummated some transaction with or in the forum (but the actual act or omission resulting in the injury here need not have occurred in this state). The defendant need not be physically within the forum when this act or transaction occurs and a single such instance may suffice;

2. The Georgia plaintiff must have a legal cause of action in tort against the non-resident, which arises out of, or results from, the purposeful activity of the defendant involving this state; a resident is the victim of a "tortious act" when he suffers an injury here due to an act or omission of negligence occurring outside this state; and

3. If the requirements of (1) and (2) are satisfied, the exercise of jurisdiction over the non-resident must be "reasonable."

> Georgia, as noted above. The deposition of Mr. Lee Leibmann, Octagon's president, indicates that the defendant shipped the solvent in question to various government depots around the country, after which the government sent it to where it was needed. (Depo. pp. 22-24.) Thus, the defendant shipped the product to an independent distributor who then controlled where it was ultimately sent. This is the closest contact Octagon has ever had with Georgia, and it simply does not qualify as "a transaction with or in the forum." *Schellenberger,* 227 S.E.2d at 273.

Bond v. Octagon Process, Inc., supra, 745 F. Supp. at 712.

Thus, the District Court concluded that the Georgia long-arm statute did not permit Georgia to assert personal jurisdiction over Octagon. Based upon this holding, the District Court need not have gone further to discuss due process requirements. Because the Georgia long-arm statute furnishes adequate state statutory grounds for the denial of personal jurisdiction over Octagon, this Court need not and should not reach the federal constitutional due process arguments of petitioners.

B. Established Supreme Court Precedent Fully Supports the Decision of the Lower Courts.

The due process clause of the Fourteenth Amendment protects an individual's liberty interest by ensuring that an individual is not subject to a binding judgment in a forum with which the individual has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The due process clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some

minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

In *International Shoe Co. v. Washington, supra,* 326 U.S. at 316, the Supreme Court held that:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain [1] minimum contacts with it such that the maintenance of the suit does not offend [2] "traditional notions of fair play and substantial justice." quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

In *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) this Court further refined its due process analysis by stating that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The purposeful availment requirement ensures that a defendant will not be haled into a distant state solely as a result of "random, isolated or fortuitous" contacts, *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) or because of the "unilateral activity of another party or a third person." *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

To satisfy the test of minimum contacts, the plaintiff is obligated to carry the burden of proving that the defendant has purposefully availed himself of the privilege of conducting activities within the forum state thereby invoking the benefits and

protections of its law, and that defendant's conduct and connection with the forum state are such that the defendant should anticipate being haled into the forum court. *Hanson v. Denckla, supra,* 357 U.S. at 253; *Kulko v. California Superior Court,* 436 U.S. 84, 97-98, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978). This Court has repeatedly emphasized that the *purposeful* nature of the defendant's conduct targeted or directed at the forum by the defendant is the determinative factor, rather than mere foreseeability of the consequence or effect of the defendant's conduct. *Hanson v. Denckla, supra,* 357 U.S. at 253; *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at 297-98; *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 108-9, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion of Justice O'Connor).

The petitioners failed to carry their burden in this case. Thus, the conclusion of the lower courts that Octagon performed no activity purposely directed toward the forum State of Georgia: (1) is supported by the record below; (2) complies with established due process principles; and (3) does not support a grant of certiorari.

C. The Decision in *World-Wide Volkswagen v. Woodson,* 444 U.S. 286 (1980) Is Dispositive of this Case.

In *World-Wide Volkswagen, supra,* two New York residents brought a products liability suit in an Oklahoma state court against numerous defendants, including a New York automobile retailer who sold the plaintiffs an allegedly defective car. The suit arose following an automobile collision on an Oklahoma highway which occurred while plaintiffs were travelling to their new home in Arizona. Plaintiffs based their argument for jurisdiction on the theory of actual foreseeability. Due to the highly mobile nature of motor vehicles, the plaintiffs argued that the defendants should

have foreseen the possibility that their automobile would be used in another state and cause injury there.

The Court rejected plaintiffs' actual foreseeability theory. The Court clearly and specifically concluded that foreseeability alone was not a proper basis for personal jurisdiction under the due process clause, for thus every seller of chattels would in effect appoint the chattel as his agent for service of process. *World-Wide Volkswagen, supra,* 444 U.S. at 296. The Court stated that although:

> foreseeability is [not] wholly irrelevant . . . the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there. (citation omitted) The Due Process Clause, by ensuring the "orderly administration of the laws," (citation omitted) gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," (citation omitted) it has clear notice that it is subject to suit there . . . .[5]

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5. Significantly, the Court noted that absent some "purposeful availment" by the defendant corporation of the " 'privilege[s] of conducting activities with the forum State,' " due process does not permit the assertion of personal (Cont'd)

Id. at 297. The Court further explained that foreseeability is relevant to personal jurisdiction only if the sale of a product of a manufacturer or distributor arises from the defendant's expectation and efforts to serve, directly or indirectly, the market in the forum rather than from an isolated occurrence of purchase. *Id.* Thus, unless a defendant delivers his product into the stream of commerce with the expectation that it will be purchased by consumers in the forum, it is unconstitutional and unreasonable to require that the non-resident defendant be compelled to defend a suit in the forum. *Id.*[6]

World-Wide Volkswagen did not overrule the "purposeful availment" standard set forth in *Hanson v. Denckla*. Instead, the Court refined the scope of the "minimum contacts" due process analysis by holding that the assertion of personal jurisdiction requires at least an effort to transact business, either directly or indirectly, in the forum state. Under *World-Wide Volkswagen*, it is such purposeful conduct of the defendant and not the location of the product which is determinative of the issue. Thus, *World-Wide Volkswagen* controls the disposition of this case because petitioners failed to establish the existence of any conduct by respondent which rose to the level of any effort to

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(Cont'd)
jurisdiction over nonresident defendants based on the "unilateral activity" of plaintiffs over which defendants exercise no control. *Id.* at 297 quoting *Hanson v. Denckla*, 357 U.S. at 253. There was a "total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." *Id.* at 295.

6. The Court also rejected the argument that jurisdiction could be supported by the fact that the defendant enjoyed certain indirect benefits such as earning revenues from goods used in the forum state. *World-Wide Volkswagen*, 444 U.S. at 298-299. "[F]inancial benefits accruing to the defendant from a collateral relation to the forum state will not support jurisdiction" unless they stem from a "constitutionally cognizable contact" with that state. *Id.* at 299 quoting *Kulko v. California Superior Court*, 436 U.S. at 94-95.

transact any business, directly or indirectly, in the forum State of Georgia.

Although Octagon manufactured a solvent for the Department of Defense pursuant to government contract, and under the government's specifications and supervision, the record is devoid of any conduct of Octagon directed toward Georgia, either directly or indirectly. The record is absolutely clear that Octagon did not have any expectation or make any efforts, whatsoever, to market directly or indirectly the solvent in Georgia. Manifestly, the record demonstrates that Octagon did not deliver its product into the "stream of commerce" with the expectation that the solvent would be purchased by consumers in the State of Georgia. Accordingly, petitioner's reliance on the "stream of commerce" theory is misplaced under the facts of this case.

Although *World-Wide Volkswagen* explicitly rejected the concept that "mere foreseeability" was enough to subject a non-resident corporation to personal jurisdiction in the forum state, petitioners vainly seek to employ the "foreseeability" concept, albeit under the rubric of the "stream of commerce" theory, to attempt to subject Octagon to *in personam* jurisdiction in Georgia. The petitioners' argument is equivalent to the proposition that one's product becomes one's agent for service of process, a proposition squarely rejected by *World-Wide Volkswagen*.

Simply stated, petitioners are in error and *World-Wide Volkswagen* compels the conclusion that the case was properly dismissed for lack of personal jurisdiction. The lower courts focused upon Octagon's conduct and connection with Georgia and properly concluded that Octagon was not amenable to suit in Georgia. Further, because this case does not involve a sale of a product to a consumer, *World-Wide Volkswagen* also compels the conclusion that Octagon is not subject to personal jurisdiction in the State of Georgia. Moreover, the unilateral conduct of the

United States government in controlling the destination of the product defeats petitioners' allegation of personal jurisdiction over Octagon. *Helicopteros Nacionales, supra.*

D. *Asahi* Does Not Control the Disposition of this Case.

Petitioners rely heavily upon the case of *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). In *Asahi,* a Japanese supplier sold tire valves to a Taiwanese manufacturer, knowing that some of the valves would be assembled in Taiwan into tires bound for sale in the United States. The plaintiff suffered injury from a defective tire and filed suit in California against the tire manufacturer. The manufacturer cross-claimed against the Japanese supplier for indemnification.

Although the Supreme Court was unable to agree on the appropriate parameters of "minimum contacts" under the facts of the case, the Court unanimously agreed that it would be unreasonable to hold the Japanese supplier amenable to personal jurisdiction in California under the second prong (*i.e.,* the reasonableness of exercising jurisdiction) of the *International Shoe* test. In Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1067 at 289 (1987), the authors succinctly analyze the voting split of the *Asahi* Court as follows:

> Although the Supreme Court agreed unanimously on other grounds that the California court's exercise of jurisdiction was unreasonable [under the second prong of the *International Shoe* test], Justice O'Connor, in a portion of her opinion for the Court that was joined only by the Chief Justice and Justices Powell and Scalia, also argued that jurisdiction could not be justified under the stream of commerce theory. She took the position that "[t]he placement of a product into the stream of

> commerce, without more, is not an act of the defendant purposefully directed toward the forum state." Rather, "additional conduct" indicating "an intent or purpose to serve the market in the forum state" also is necessary.[7]
>
> Justice Brennan, joined by Justices Blackmun, Marshall, and White, disagreed, arguing that a defendant properly may be subject to jurisdiction whenever "the regular and anticipated flow of products," as opposed to "unpredictable currents or eddies," leads the product to be marketed in the forum state.

In *Asahi* the Court decided the case based upon the second prong of the *International Shoe* two-part test, and arguably never had to reach the first prong of the *International Shoe* test (*i.e.*, minimum contacts). What is clear from *Asahi*, however, is that the mere fact that one's product finds its way into the forum state is insufficient in and of itself to sustain an assertion of *in personam* jurisdiction. Although Justice Brennan, joined by Justices White, Marshall and Blackmun was more willing to embrace a "stream of commerce" theory, he was unwilling to totally abandon the requirement that there be some transaction of business in the forum state. Justice Brennan's opinion was based upon the statement in *World-Wide Volkswagen* that jurisdiction might be proper where products are delivered into commerce "with the expectation that they will be purchased by consumers in the forum State." Justice Brennan focused on whether the defendant "is aware that the final product is being marketed in the forum State" because such a defendant "benefits economically from the retail sale of the final product in the forum

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7. This position comports with traditional Supreme Court jurisprudence and was adopted by the lower courts in this case.

State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi,* 480 U.S. at 117. Thus, the difference of opinion in *Asahi,* was largely whether due process requires that the defendant have somehow actively engaged, directly or indirectly, in commercial activity in the forum state or whether passive indirect benefits from a commercial transaction of others within the forum state are enough for the assertion of jurisdiction.

In applying *Asahi* to the present matter, it is clear that neither Justice O'Connor's plurality opinion nor Justice Brennan's concurring opinion support an assertion of *in personam* jurisdiction over Octagon because there was no commercial transaction in the forum State of Georgia.

E. There Is No Split of Opinion in the First, Fifth and Seventh Circuits.

Petitioners assert in conclusory fashion, and without explanation, that the Eleventh Circuit decision in this case is in conflict with certain decisions of the First, Fifth and Seventh Circuits. There is no "intolerable conflict" in either principle or outcome between the Eleventh Circuit's decision in this case and the decisions in the First, Fifth and Seventh Circuits cited by petitioners. The Circuit cases cited by petitioners consist of entirely different facts wherein the defendants (all alien corporations) maintained sufficient activities in or in connection with the forum state to support a finding of personal jurisdiction. In addition, these cases all involved sales of products by a manufacturer which were purposely directed to the forum state, unlike this case where the solvent was manufactured pursuant to government contract, specifications and supervision. Thus, all of the Circuit cases relied upon by petitioners are absolutely distinguishable, non-controlling and inapposite to this case.

Petitioners cite *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018, 109 S.Ct. 1135, 103 L.Ed.2d 196 (1989), while conceding that the facts involved *direct marketing* by the defendant in the forum State (Pb at 18). The First Circuit held that a Brazilian manufacturer of pressure cookers was subject to personal jurisdiction in Puerto Rico. The First Circuit found that the Brazilian manufacturer sold hundreds of thousands of pressure cookers to persons in the United States and Puerto Rico; that the manufacturer knew and intended that Americans would use its cooker in commerce in America; and most importantly, that the manufacturer had taken active steps to directly market and sell its product in Puerto Rico, including the retention of a Florida "sales representative" who travelled to Puerto Rico to sell cookers at least four times a year. *Id.* at 29.

In *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir.), *reh'g denied*, 872 F.2d 423, *cert. denied sub nom., Jugometal Enterprise For Import and Export of Ores and Metals v. Irving*, ____ U.S. ____, 110 S. Ct. 83, 107 L. Ed. 2d 49 (1989), the Fifth Circuit ruled that a Yugoslavian asbestos distributor was subject to the exercise of personal jurisdiction in Texas under the state's long-arm statute. The Fifth Circuit held that the asbestos distributor was subject to personal jurisdiction in Texas where it held itself out as a seller in a contract to supply asbestos to an American company-broker in Texas; conveyed the asbestos to a freight forwarder for shipment to Texas; shared the cost of quality control testing done by a Texas laboratory; received debits for the shipping bag-cleaning charges of another Texas company; and accepted payments for the asbestos and stored it in Texas. *Id.* at 386. The Fifth Circuit concluded that these direct and substantial actions by the Yugoslavian asbestos distributor with the forum State of Texas satisfied the minimum contacts prong of the due process test, and thus subjected the Yugoslavian asbestos manufacturer to personal jurisdiction in Texas. *Id.*

In *Gulf Consol. Services v. Corinth Pipeworks, S.A.*, 898 F.2d 1071 (5th Cir.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 256, 112 L. Ed. 2d 214 (1990), the Fifth Circuit, in a 2 to 1 decision, held that a Greek oil field casing manufacturer, which directly marketed its product in Texas, was subject to personal jurisdiction in Texas. The majority opinion concluded that, "a Greek oil field casing manufacturer, licensed by a Texas-based organization which allows the [Greek] manufacturer to warrant conformity with certain set [American Petroleum Institute ("API")] standards, was properly haled into court in Texas to answer a claim that its products failed to conform to those standards." *Id.* at 1072. The Fifth Circuit concluded that the exercise of personal jurisdiction was appropriate where the Greek manufacturer sold and shipped oil casings to a Texas importer; the Greek manufacturer had a license agreement with another Texas organization to sell API specification pipe; the Texas importer relied on the Greek manufacturer's warranty that the casing was manufactured in accordance with API specification; the Greek manufacturer's sole market was Texas; the Greek manufacturer's representatives frequently called on customers in Texas; and the Greek manufacturer, "was the charterer of the vessels which carried the casing shipments from Greece to Houston." *Id.* at 1074. Circuit Judge Rearley dissented and expressed the opinion that in the subject *contract* case, the Greek manufacturer had not attempted to exploit the Texas market and that the Texas courts did not have personal jurisdiction under either prong of the personal jurisdiction test.

In *Mason v. F. LLI Luigi & Franco Dal Maschio Fu G.B. s.n.c.*, 832 F.2d 383 (7th Cir. 1987), the Seventh Circuit held that an Italian partnership that manufactured a broom flagging machine which injured a worker, was subject to personal jurisdiction in Illinois under the state's long-arm statute. The machine was manufactured by an Italian partnership, F. Lli Luigi

and Franco Dal Maschio Fu G.B. s.n.c. ("Dal Maschio"), in Italy. The machine was sold by Dal Maschio to Werner Petzold & Co. ("Petzold") in Maryland. In turn, Petzold sold the machine to the Libman Broom Company in Illinois, where the worker was injured. The Seventh Circuit concluded that Dal Maschio had had sufficient minimum contacts to subject it to personal jurisdiction in Illinois:

> In this case, Dal Maschio made the machine involved in the accident and similar machines especially for Libman, and one of its employees visited Libman in Illinois several times to show how to set up, operate and service the machines and to teach its personnel. Dal Maschio knew that the machines were custom-made for an Illinois manufacturer, *viz.*, Libman, even though shipped and billed to Werner Petzold & Co. in Maryland. Werner Petzold was in fact its export manager rather than an independent distributor. The injury occurred to an Illinois resident in Illinois, and Illinois has an interest in having that injury fully rectified.

Id. at 386.[8]

The Circuit cases cited by petitioners do *not* present a conflict with the decision of the Eleventh Circuit in this case. All of the

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8. The Seventh Circuit stated that, "[l]ike the example used in *World-Wide Volkswagen* to show where personal jurisdiction would be proper, this defendant delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. 444 U.S. at 297-98, 100 S.Ct. at 567-68. In addition, it purposely availed itself of the privileges of conducting activities within the forum state through its own employee and also its export manager Werner Petzold." *See* 444 U.S. at 297, 100 S. Ct. at 587. *Mason,* 832 F.2d at 386.

Circuit cases cited by petitioners involved direct and purposeful acts taken by foreign manufacturers to avail themselves of a defined market within the United States. Petitioners' allegation of a conflict among the Circuits is therefore meritless.[9]

II.

THE ELEVENTH CIRCUIT DID NOT COMMIT ERROR BY DISMISSING THE CASE RATHER THAN TRANSFERRING THE CASE TO NEW JERSEY PURSUANT TO 28 U.S.C. § 1406(a), WHERE PETITIONERS NEVER REQUESTED OR RAISED THE TRANSFER ISSUE TO THE DISTRICT COURT.

Petitioners assert that the lower courts erred by dismissing this case, rather than *sua sponte* transferring the case to the District Court for New Jersey. Petitioners claim error for their self-inflicted failure to raise and present the transfer issue to the District Court. Significantly, petitioners *never* raised this issue to the District Court by motion, opposition brief, pleading or otherwise. Petitioners noted the issue for the first time before the Eleventh Circuit after their "all or nothing" tactic before the District Court proved to be unsuccessful. The Court of Appeals declined to find error based on the record before it.

The exercise of discretion by the courts below is not an issue which merits the grant of a writ of certiorari. It does not effectuate a change in the law which will have an impact on other litigants, nor does it present an issue which calls for a pronouncement from

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9. Petitioners' conclusory allegation in their Petition for Writ of Certiorari that the decision in this case is contrary to *Morris v. S.S.E. Inc.*, 843 F.2d 489 (11th Cir. 1988) is without merit. The Eleventh Circuit has consistently applied the *Asahi* "purposeful availment" plurality standard. *See, Morris v. S.S.E., Inc. supra; Madara v. Hall*, 918 F.2d 1510 (11th Cir. 1990) (not cited by petitioners) and *Bond v. Octagon Process, Inc., supra.*

the Supreme Court of the United States. The decision of the District Court has already been reviewed by the Eleventh Circuit and found to have been proper.

Petitioners first raised the issue of transfer in their appeal to the Eleventh Circuit. The Eleventh Circuit declined to reverse the District Court because petitioners had failed to raise the issue below. *See Hormel v. Helvering,* 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."). Similarly, petitioners' reliance on *Goldlawr v. Heiman,* 369 U.S. 463, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962) was apparently deemed misplaced by the Eleventh Circuit, in view of petitioners' failure to raise the issue with the District Court, despite ample opportunity to do so.[10]

Petitioners also rely on 28 U.S.C. § 1406(a), which provides that:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought . . . .

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10. Petitioners' argument that they would have lost their right to appeal the personal jurisdiction issue by moving before the District Court for transfer of the case is incorrect. Petitioners could have preserved their right to appeal the personal jurisdiction issue by, *inter alia,* seeking the alternative relief of a transfer and a stay of that transfer pending the outcome of appellate review on the personal jurisdiction issue. In the alternative, after the District Court decided the personal jurisdiction issue, petitioner could have sought reconsideration on the issue of transfer or sought relief pursuant to F. R. Civ. P. 60. They elected to pursue only this appeal, and should not be heard to complain when their election was unwise. The lack of a transfer was thus petitioners' error, not the District Court's error.

The statute directs a District Court to dismiss a case as the primary form of relief. There are no facts in the record below indicating that transfer as opposed to dismissal is in the interests of justice. Since petitioners never raised the issue of transfer to the District Court, the District Court did not commit any error or abuse of discretion by applying the plain language of the statute. *See United States v. Wright Motor Co., Inc.*, 536 F.2d 1090, 1093-94 (5th Cir.), *reh'g. denied*, 542 F.2d 576 (5th Cir. 1976)[11] ["If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." quoting *Lines v. Falstaff Brewing Co.*, 233 F.2d 927, 933 (9th Cir.), *cert. denied*, 352 U.S. 893, 77 S. Ct. 129, 1 L. Ed. 2d 88 (1956)]. Indeed, none of the cases cited by petitioners supports the proposition that a failure to transfer, *sua sponte*, constitutes error of any sort. For these reasons, the lower courts did not err in dismissing the case.

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11. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

CONCLUSION

For the reasons presented herein, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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